

**United States Department of Labor
Employees' Compensation Appeals Board**

MARVIN H. McINTYRE, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
East Saint Louis, IL, Employer**

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**Docket No. 04-2015
Issued: January 19, 2005**

Appearances:
Marvin H. McIntyre, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On August 9, 2004 appellant filed a timely appeal of a decision of the Office of Workers' Compensation Programs dated July 28, 2004 which denied merit review. Because more than one year has elapsed between the last merit decision of the Office dated July 31, 2003 and the filing of this appeal on August 9, 2004, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

This case has been before the Board previously. In a March 27, 2003 decision, the Board found that the Office abused its discretion in failing to reopen appellant's case for further merit review as he submitted relevant medical evidence indicating that his left wrist condition had

worsened such that he could be entitled to an increased schedule award.¹ The law and the facts as set forth in the previous Board decision and order is incorporated herein by reference.

On June 20, 2003 the Office referred the medical evidence, including a February 22, 2000 report from Dr. Bruce T. Vest, an attending Board-certified orthopedic surgeon, to an Office medical adviser for an impairment rating under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*).² In a report dated June 26, 2003, the Office medical adviser concluded that appellant had a 34 percent permanent impairment of the left upper extremity, which was less than the 44 percent previously awarded. By decision dated July 31, 2003, the Office found that appellant was not entitled to an increased schedule award for his left upper extremity impairment.

In a letter dated April 16, 2004, appellant requested the assistance of his congressional representative who, by letter dated April 28, 2004, requested that the Office review appellant's case. By letter dated May 4, 2004, the Office informed appellant's congressional representative that it would consider the April 28, 2004 letter a reconsideration request. On June 7, 2004 appellant forwarded to the Office a copy of the decisions of the Board dated March 27, 2003 and the Office dated July 31, 2003. By decision dated July 28, 2004, the Office denied the request, finding that appellant neither raised a substantive legal question nor included new relevant evidence and was not entitled to a merit review.

LEGAL PRECEDENT

Section 10.608(a) of the Code of Federal Regulations provides that a timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section 10.606(b)(2).³ This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; or (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office.⁴ Section 10.608(b) provides that when a request for reconsideration is timely but fails to meet at least one of these three requirements, the Office will deny the application for reconsideration without reopening the case for a review on the merits.⁵

¹ Docket No. 03-200.

² A.M.A., *Guides* (5th ed. 2001); *Joseph Lawrence, Jr.*, 53 ECAB ____ (Docket No. 01-1361, issued February 4, 2002).

³ 20 C.F.R. § 10.608(a).

⁴ 20 C.F.R. § 10.608(b)(1) and (2).

⁵ 20 C.F.R. § 10.608(b).

ANALYSIS

The only decision before the Board in this appeal is the decision of the Office dated July 28, 2004 denying appellant's application for review. Because more than one year had elapsed between the date of the Office's most recent merit decision dated July 31, 2003 and the filing of his appeal with the Board on August 9, 2004, the Board lacks jurisdiction to review the merits of appellant's claim.⁶

On reconsideration, appellant did not submit any additional evidence but contended that the medical evidence of record established that he was entitled to further schedule award compensation. The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.⁷ While the reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.⁸ Appellant did not show that the Office erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by the Office. Moreover, he failed to submit new and relevant evidence with his reconsideration request.⁹ The Board therefore finds that the Office properly determined that appellant's request did not constitute a basis for reopening the case for further merit review.¹⁰

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's claim for merit review on July 28, 2004.¹¹

⁶ 20 C.F.R. § 501.3(d)(2).

⁷ *James E. Norris*, 52 ECAB 93 (2000).

⁸ *Robert P. Mitchell*, 52 ECAB 116 (2000).

⁹ *Supra* note 3.

¹⁰ *Supra* note 4.

¹¹ The Board notes that appellant retains the right to file a claim for an increased schedule award based on medical evidence indicating that the progression of an employment-related condition, without new exposure to employment factors, has resulted in a greater permanent impairment than previously calculated. *Linda T. Brown*, 51 ECAB 115 (1999).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 28, 2004 be affirmed.

Issued: January 19, 2005
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member